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RE DATUK LOH FOOK YEN, EX P PERWIRA AFFIN BANK

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[BANKRUPTCY NO: 29-35-98]
5 JULY 2002

b

BANKRUPTCY: *Notice - Application to set aside - Cross-demand - Whether must be filed in court to qualify as a cross-demand - Whether there was sufficient evidence to prove cross-demand equalled or exceeded judgment debt*

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This was the judgment debtor's attempt to set aside a bankruptcy notice served on him; he alleged in his affidavit that he had a cross-demand for losses sustained as a result of a wrongful presentation of a creditor's petition against him in another bankruptcy suit. The judgment debtor, however, admitted that he had not filed the cross-demand in court at the time of the filing of the affidavit, or even up to the date of this hearing. Although a judgment debtor may successfully defeat a bankruptcy notice by declaring in an affidavit that he has a counter-claim, set-off or cross-demand which exceeds or equals the amount of the judgment, it was unclear whether the counter-claim, set-off or cross-demand must be filed first in court before it was alluded to in his affidavit.

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Held:

[1] An argument based on mere assertions of a counter-claim or set-off that was not filed in court would not be acceptable, but since the scope of a cross-demand was fairly wide, a cross-demand yet to be filed in court would qualify. That being so, an enforceable judgment or bankruptcy notice was not a pre-condition to qualify as a cross-demand. However, in the present case, there was no reasonable probability of success on the part of the judgment debtor founded on a cross-demand, as there was insufficient evidence to prove any supposed financial loss which could equal or exceed the sum of the judgment debt. (pp 287 a-g & 288 a)

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[Appeal dismissed.]

Case(s) referred to:

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 2 MLJ 301 ***(refd)***

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In Re A Debtor [1934] 1 Ch 347 ***(refd)***
In Re A debtor No 80 of 1957 [1958] 1 Ch 81 ***(refd)***
In Re A Bankruptcy Notice [1934] 1 Ch 431 ***(refd)***
In Re GEB A Debtor [1903] 2 KB 340 ***(refd)***
Re A Debtor (No. 75 of 1982, Warrington), ex p the Debtor v. National Westminster Bank [1983] 3 All ER 545 ***(foll)***

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Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 MLJ 304 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, rr. 94(1)(b), 95(1)

Other source(s) referred to:
Williams and Muir Hunter on Bankruptcy, 19th edn, p 37

For the respondent/judgment creditor - WM Lee; M/s Shook Lin & Bok
For the appellant/judgmet debtor - Datuk MS Murthi; M/s Murthi & Partners

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:
This case before me which has a chequered history, shorn of all the unnecessary facts relates to an attempt by the judgment debtor to set aside a bankruptcy notice, which had been served on him. The judgment debtor in his affidavit (hereinafter referred to as the intimation-connected affidavit or interchangeably as merely the affidavit) had alleged that he had a cross-demand for losses sustained as a result of a wrongful presentation of a creditor's petition against him in another bankruptcy suit. The current impugned bankruptcy notice was founded on a judgment going back all the way to 23 October 1987.

To succeed in setting aside a bankruptcy notice, a judgment debtor must without reservation satisfy the court that the conditions as listed under r. 94(1)(b) of the Bankruptcy Rules 1969 had been complied with. The latter must prove that he has either:

(1) a counter-claim;

(2) a set-off; or

(3) a cross-demand,

which equals or exceeds the judgment debt. This burden which rests on the shoulders of the judgment debtor is certainly an onerous one (*Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304; *In Re GEB A Debtor* [1903] 2 KB 340; *In Re A Bankruptcy Notice* [1934] 1 Ch 431: *In Re A Debtor* [1934] 1 Ch 347).

Due to the special nature of the action under r. 95(1) the filing of an intimation-connected affidavit would operate as an application to set aside the impugned bankruptcy notice, hence the dispensation of a summons (*Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 2 MLJ 301). After reading this provision, one then is catapulted back to r. 94, in particular sub-r (1)(b). This provision reads:

(1) Every bankruptcy notice shall be endorsed with:

(a) ...

(b) an **intimation** to the debtor that if he has any counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an **affidavit** to that effect with the Registrar (emphasis added).

(2) In the case of a notice served in the Federation the time shall be seven days ... .

Subject to the above provision, it thus would be incumbent upon the judgment debtor when filing the intimation-connected affidavit in question, to meticulously show the existence of a counter-claim, set-off or cross demand which equalled or exceeded the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained. In the current case, even though the judgment debtor had affirmed his losses, but without the necessity of dwelling onto the details of the affidavit by me, what was strikingly clear was that nothing was mentioned whether the averment of counter-demand had been filed in court or not at the time of the filing of the affidavit. Everything became clearer when counsel for the judgment debtor admitted in open court that he had not done so, even up to the day of the hearing before me.

It must be emphasised that rr. 94 and 95 of the Bankruptcy Rules 1969 are intertwined with s. 3(1)(i) of the Bankruptcy Act 1967, and thus must be read together. For completeness I herewith supply the relevant portion of the latter provision it reads:

A debtor commits an act of bankruptcy in each of the following cases:

(a) ...

(b) ...

(c) ... etc.

(i) if a creditor has obtained a final judgment ... against him ... has served on him ... a bankruptcy notice ... and he does not within seven days after service ... either comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt ... and which he could not set up in the action in which the judgment was obtained ... .

The common factor in those provisions is that, a judgment debtor may successfully defeat a bankruptcy notice by declaring in an affidavit that he has a counter-claim, set-off or cross demand, which exceeds or equals the amount of the judgment. What is unclear in the above provisions is whether before alluding to those averments in the intimation-connected affidavit, must they be filed first into court or otherwise. If the answer is in the positive, then the judgment debtor cannot depend on them to extricate himself out of his precarious predicament.

Before arriving at any conclusion, it would be timely and necessary for me to set out some of the relevant references adverted to by me. In the *Dictionary of Law* by PH Collin 'counterclaim' is defined as:

> claim in a court by a defendant against the plaintiff who has already brought in a claim against him.

In *Black's Law Dictionary* 6th edn:

i. 'counter-claim' is authored as:

> A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff ... . If established, such will defeat or diminish the claim of the plaintiff's claim.

ii. 'Cross-claim' is defined as:

> Cross-claims against co-parties are governed in the federal district courts and in most state trial courts by Rule of Civil Procedure ... .
>
> Counterclaim distinguished. 'Cross claims' are litigated by parties on the same side of the main litigation, while 'counterclaims' are litigated between opposing parties to the principal action.

iii. Set-off is defined as:

> A claim filed by a defendant against the plaintiff when sued and in which he seeks to cancel the amount due from him or to recover an amount in excess of the plaintiff's claim against him.

In *In Re A Bankruptcy Notice* [1934] 1 Ch 431 at 437 Lord Hamworth MR had occasion to say:

> With regard to the word 'set-off' that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made and against the sum so demanded can be set-off.

Williams and Muir Hunter on Bankruptcy 19th edn had also opined at p. 37 that the registrar "must consider whether in the light of the evidence adduced by either side, there is a genuine triable case of set-off, etc ... which is **presently enforceable by action** and not merely a claim which might be the subject of a set-off in the bankruptcy ... . (emphasis added).

iv. Cross demand is defined as:

> Where a person against whom a demand is made by another, in his turn makes a demand against that other, these mutual demands are called 'cross-demands'. A set-off is a familiar example. See also counter-claim; cross-claim; cross complaint.

Warner J in *Re A Debtor (No. 75 of 1982, Warrington) ex parte the Debtor v. National Westminster Bank* [1983] 3 All ER 545 at 553 had remarked:

> First, the affidavit or affidavits must show that he has a cross demand against the creditor which is **genuine**. To satisfy that requirement, the cross-demand must be put forward in **good faith**, and must have a **reasonable probability of success**, or as it has also been expressed, **must give rise to a triable issue** ... . (emphasis added).

In the abovementioned case of *In Re A Debtor No. 80 of 1957* [1958] 1 Ch 81 at p. 90, Jenkins LA after a thorough discussion of the word 'cross-demand' had said:

> From these authorities upon the relevant provision of the Bankruptcy Act it appears that a 'cross-demand' is a term of wide import **extending to matters which would not be covered by** the expressions 'counter-claim' or 'set-off,' .... . (emphasis added).

From the above definitions and views from case laws, even a cursory scrutiny will indicate that for all three averments to be effective, they must possess certain characteristics. Suffice for me to conclude at this juncture that cross-claims and set-offs may be lumped together whilst cross demands separated from them. For cross-claims and set-offs, apart from being genuine and capable of being substantiated, must also have been filed into court prior to the filing of the intimation connected affidavit (see also *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 MLJ 304).

I had to bear in mind that under s. 3 of the Bankruptcy Act, for a judgment debtor to succeed, the court must be satisfied of one of the averments (see the provision above). Notwithstanding the fact that the issues of counter-claim or set-off have not been ventilated by the judgment debtor, due to the peculiar lumping of the averments in the discussed provisions, I will not hesitate to

refer to them for analogy and comparison purposes. Needless to say, after a soul-searching exercise, I was unable to appreciate an argument that would be based on mere assertions of counter-claims or set-offs without more, especially when no claims have been filed in any court in Malaysia. If filing of claims into court were not one of the criteria, it would not take much for any desperate judgment debtor to resort to unsavoury measures to avoid being declared bankrupt. Surely the very filing of these matters would be a very pertinent factor of consideration for the registrar, as it would rebut any allegation of a flimsy attempt on the part of the judgment debtor to deny the judgment creditor of the fruits of his labour.

I had also to bear in mind that the judgment, which will be the premise of a particular bankruptcy notice, must invariably have been obtained way back before the serving of the latter notice. Surely, no reasonable person, who is faced with a judgment hanging over his head, would hesitate to file either a counter-claim or set-off in court if he genuinely has one. With the claim having been filed in court not only will he be in better stead mentally and tactically, but also if successful be able to cancel off or neutralise the effect of the judgment obtained by the judgment creditor. I could only conclude that apart from ignorance and financial constraints, the unwillingness by a judgment debtor to file and litigate his rights prior to the filing of the intimation-connected affidavit must be due to his awareness of the futility of filing an unsatisfactory counter-claim or set-off.

I must admit that due to the nature of the course of action and its stage here, let alone the terminology promulgated by Parliament, it took me sometime to decide whether in the circumstances of the case, for a demand to qualify as a cross-demand the judgment debtor must only serve an enforceable judgment or bankruptcy notice to the petitioner. Being mindful of the views of Jenkins LJ in *In Re A Debtor No. 80 of 1957*, in that the scope of a cross-demand is fairly wide, I concluded that a cross-demand yet to be filed in court would qualify. That being so, an enforceable judgment or bankruptcy notices is not a precondition to qualify as a cross demand here. If I may attempt a more helpful definition, in a cross demand a judgment or bankruptcy notice would be included within its ambit, regardless of them having been filed in court or not. On the other hand as in the circumstances of the case, the non-filing of a cross-demand especially even up to this late stage, may attract an adverse inference. In the current case I was unable to conclude that the cross-demand had been satisfactorily proved, not because there was no pending case that equalled or exceeded the amount of the judgment debt, but because there was insufficient evidence to substantiate it.

To summarise the evidence, I had to conclude that there was no reasonable probability of success on the part of the judgment debtor here founded on a cross demand, as there was insufficient evidence to prove any supposed financial loss, which could equal or exceed the sum of the judgment. The supposed losses suffered, due to the failure of the judgment debtor to accept the offer of the executive director's position, was his own making as he had rejected it on his free will. The adverse publicity, if any, was brought upon himself by his continuous refusal to pay.

Based on all the above legal interpretations and finding of facts I had no hesitation in rejecting the appeal of the judgment debtor with costs.